WHDH-TV *and* American Federation of Television and Radio Artists, Boston Local. Case 01–CA–046744

March 19, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On April 11, 2012, Administrative Law Judge Raymond P. Green issued the attached decision. The Acting General Counsel and the Charging Party each filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order.

Relying on *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), affd. in relevant part sub nom. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), the judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by ceasing to honor employees' dues-checkoff authorizations after the expiration of the parties' collective-bargaining agreement.

After the judge issued his decision, we overruled *Bethlehem Steel* and its progeny "to the extent they stand for the proposition that dues checkoff does not survive contract expiration . . . ." *WKYC-TV, Inc.*, 359 NLRB No. 30, slip op. at 8 (2012). We held in *WKYC-TV* that "an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer." Id. We also decided, however, to apply the new rule prospectively only, and to apply *Bethlehem Steel* in all pending cases, such as this one. We therefore adopt the judge's finding that, because the Respondent was privileged under *Bethlehem Steel* to cease honoring the dues-checkoff arrangement after the parties' collective-bargaining agreement expired, the Respondent did not violate the Act as alleged. We shall dismiss the complaint.[1]

[1] We agree with the judge's rejection of the alternative argument of the Acting General Counsel and the Charging Party, based on *Tribune Publishing Co*., 351 NLRB 196 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009), that the Respondent tacitly agreed to extend the dues-checkoff provision by continuing to deduct and remit dues for 11 months after the contract expired, and thus could not unilaterally cease to do so thereafter. The Board found in *Tribune* that the employer unlawfully reneged on an *express agreement* to allow employees to have their union dues deducted and remitted to the union through the employer's direct deposit system during the hiatus between collective-bargaining agreements. Here, as the judge found, there is no evidence that the Respondent and the Charging Party expressly agreed that the Respondent would continue to deduct and remit union dues after the contract expired. In those circumstances, the Board has held that an employer does *not* forfeit its right under *Bethlehem Steel* to cease checking off dues merely by continuing to honor a dues-checkoff provision after contract expiration. See *West Co.*, 333 NLRB 1314, 1319–1320 (2001); see also *WKYC-TV, Inc.*, supra, slip op. at 9 fn. 33, where we rejected the same argument.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. March 19, 2013

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Don C. Firenze, Esq., for the General Counsel.
Robert P. Joy, Esq. and *Sean P. O'Connor, Esq.,* for the Respondent.
James A.W. Shaw, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Boston, Massachusetts, on February 27, 2012. The complaint essentially alleges that during the hiatus period between the old and new collective-bargaining agreements, the Respondent failed to comply with the old contract's dues-checkoff provisions.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the

meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The facts are not in dispute.

Since at least 1980, the Union and the Employer have had a collective-bargaining relationship covering all persons, staff, and freelance, who perform before the microphone or camera for the Employer. The relevant contract expired on December 31, 2008, but was extended by the parties until April 26, 2010. The contract, at article 17, contained a dues-checkoff clause. It was stipulated that the Respondent ceased complying with the checkoff provision on March 30, 2011, and that it resumed checking off and remitting dues to the Union on August 22, 2011. At a later point, the parties entered into a new contract.

It was agreed that during the hiatus period between the contracts, there were 22 employees who had current dues-checkoff authorizations and for whom the Respondent did not deduct dues from their pay or remit dues to the Union. One employee, Jonathan Hall, paid his dues directly to the Union.

The General Counsel concedes that under existing law, I should find that the Respondent did not violate the Act. The General Counsel is seeking to change the law. The Union argues an alternative position, which is that because the Employer waited for a long time after the contract's expiration before refusing to enforce the checkoff provision, it had acquiesced in its continuation after expiration. It therefore argues that the Employer had tacitly agreed to continue it during the hiatus period.

In *Bethlehem Steel Co*., 136 NRB 1500, 1502 (1962), enf. denied on other grounds, 320 F.2d 615 (3d Cir. 1963), the Board held that union-security and dues-checkoff contact provisions do not survive the expiration of a collective-bargaining agreement. There has been a good deal of recent debate among Board Members as to whether this view of the law should remain valid and this has been expressed in a series of cases involving *Hacienda Resort Hotel & Casino*.[1]

All of the parties made interesting arguments as to why the rationale cited in *Bethlehem Steel* should either be sustained or overruled. But as I am required to follow existing Board law,[2] these arguments have to be addressed to the Board itself.

I am also unpersuaded that the Union's alternative theory has merit. Under current law, a union-security clause and a concomitant dues-checkoff clause requires, pursuant to Section 8(a)(3), the existence of a collective-bargaining agreement containing a provision consistent with what is permitted under that section of the statute. Here, the contract expired and during the hiatus, the Company ceased, for a period of time, to comply with the dues-checkoff provision of the expired agreement. There is no evidence that the Company made any agreement, express or implied, to extend that contract provision after the expiration date in the absence of a new collective-bargaining agreement. I do not conclude that the mere fact that the Respondent continued for some time after the contract's expiration to deduct and remit dues should be construed either as some kind of "waiver" or some kind of tacit agreement. See *Tribune Publishing Co*., 351 NLRB 196 (2007), enfd. 564 F.3d 1330 (D.C. Cir. 2009).

In light of the above, I conclude that the Respondent has not violated the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[3]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., April 11, 2012

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[1] The initial *Hacienda* case is reported at 331 NLRB 665 (2000), which was remanded in *Local Joint Executive Board of Las Vegas v. NLRB*, 309 F.3d 578, 584–585 (9th Cir. 2002). A later decision was issued by the Board at 351 NLRB 504 (2007) and this also was remanded. The final Board decision in this series was reported at 355 NLRB 742 (2010). That decision was split 2 to 2 on the relevant issue.

[2] *Waco Inc*., 273 NLRB 746, 749 fn. 14 (1984).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.